FEB 16 2001

No. 00-201

Supreme Court, U.S.
FILED
FEB 16 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFE ROBBINS and DAVID S. WHITFORD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* OF ELLEN SCHRECKER, STANLEY N. KATZ, DAVID MONTGOMERY, LINDA GORDON, LEON F. LITWACK, BLANCHE WIESEN COOK, PETE DANIEL, MARILYN B. YOUNG, ALAN TRACHTENBERG, PETER RACHLEFF, LAWRENCE S. WITTNER, WILLIAM R. TAYLOR and DAVID L. SCHALK IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. THE HISTORIANS' CRAFT DOES NOT DEPEND ON ACCESS TO COMMERCIAL ELECTRONIC DATABASES	13
A. Newspaper and Magazine Articles Are Only One Among Many Sources For Historical Research	14
B. The Methodology of Historians Is Not Based on Using Individual Newspaper and Magazine Articles as Essential Building Blocks	19
C. The Burns *Amici* Overstate the Importance of Commercial Databases to the Preservation of the Historical Record	23
D. Affirmance of the Second Circuit Will Have Little, If Any, Effect on the Preservation of the Historical Record	27
II. THE COPYRIGHTS OF FREELANCE WRITERS SHOULD NOT BE IGNORED SIMPLY TO SOLVE THE UNRELATED PROBLEM OF NEGLECT OF THE NATION'S ARCHIVES	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

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INTERESTS OF *AMICI CURIAE*[1]

ELLEN SCHRECKER is Professor of History at Yeshiva University. She is the author of *Many Are the Crimes: McCarthyism in America*; *No Ivory Tower: McCarthyism and the Universities*, which received the History of Education Society's Outstanding Book Award; and *The Hired Money: The French Debt to the United States, 1917-1929*. Her articles and reviews have appeared in numerous publications, including Journal of American History, Antioch Review, American Historical Review, New York University Education Quarterly, and the Women's Review of Books. She has been a research fellow at the Harry S. Truman Library, a fellow of the National Humanities Center at Research Triangle, North Carolina, a fellow of the Bunting Institute of Radcliffe College, and a lecturer for the United States Information Agency. Professor Schrecker is a member of PEN, editor of the American Association of University Professors official publication, Academe, and has been an adviser on numerous film documentaries. She has also taught at Columbia University, Princeton University, New York University, and the New School for Social Research. She received her M.A. and Ph.D. from Harvard University.

STANLEY N. KATZ is currently Lecturer with the rank of Professor at the Woodrow Wilson School of Public and International Affairs, Princeton University. He is President Emeritus of the American Council of Learned Societies, the leading organization in humanistic scholarship and education in the United States. Formerly Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University, Professor Katz is a leading expert on

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

American legal and constitutional history. He is also active in the research field of arts and cultural policy, and currently serves as the Director of the Princeton University Center for Arts and Cultural Policy Studies in the Woodrow Wilson School, and as President of the National Initiative for a Networked Cultural Heritage. Professor Katz is currently completing a book on the behavior of non-governmental peace and conflict resolution organizations in Northern Ireland, Israel/Palestine, and South Africa in collaboration with Professor Benjamin Gidron of Ben Gurion University, Israel. The author and editor of numerous books and articles, he has served as President of the Organization of American Historians and the American Society for Legal History, and has recently been the Vice President of the Research Division of the American Historical Association. Professor Katz has just completed twelve years on the Board of Southern Methodist University, and he is a trustee of the National Faculty, the Newberry Library. He also currently serves as Chair of the American Council of Learned Societies/Social Science Research Council Working Group on Cuba. He is a member of the New Jersey Council for the Humanities, the American Antiquarian Society, the American Philosophical Society, a Fellow of the American Society for Legal History, the American Academy of Arts and Sciences, the Society of American Historians, and a Corresponding Member of the Massachusetts Historical Society. He has honorary degrees from several universities. Professor Katz received his B.A., M.A. and Ph.D. from Harvard University.

DAVID MONTGOMERY, who served as President of the Organization of American Historians during 1999-2000, was Farnam Professor of History at Yale University. He is the author of *Citizen Worker*; *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925*; *Beyond Equality: Labor and the Radical Republicans, 1862-1872*; and *Workers Control in America.*

He has served on the editorial boards of the Journal of American History, International Labor and Working Class History, and Labor History, and has been on the advisory board of the Canadian journal Labour/Le Travailleur. His writings have appeared in such publications as International Review of Social History and the Encyclopedia of American Economic History. He has been a consultant to Eleutherian Mills-Hagley Foundation's Museum of American Working Life and the University of Maryland's Samuel Gompers archives. He is a recipient of the Phi Beta Kappa Society's Ralph Waldo Emerson Award, the New England Historical Association's Book Award, and was a finalist for the Pulitzer Prize in History. He has also taught at the University of Pittsburgh, Warwick University, and Oxford University in England.

LINDA GORDON is Florence Kelley Professor of History at New York University. In 2000 she was awarded Columbia University's Bancroft Prize for her book *The Great Arizona Orphan Abduction*, which also received the Beveridge Prize for best book on the history of the Americas and the Willa Cather Nonfiction Prize. Her other books include *Pitied but Not Entitled: Single Mothers and the Origins of Welfare*; *Cossack Rebellions: Social Turmoil in the Sixteenth-Century Ukraine*; *Heroes of Their Own Lives: The Politics and History of Family Violence*; and *Woman's Body, Woman's Right: A Social History of Birth Control in America*. She has twice been nominated for the National Book Award in History. Professor Gordon has written for numerous publications including the American Historical Review, Journal of American History, Journal of Family History, Chronicle of Higher Education, New York University Review of Law, and American Quarterly. She has served on the U.S. Departments of Justice and Health and Human Services Advisory Council on Violence Against Women. She is a consultant to the Schlesinger Library Project for Collection and Preservation of

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LEON F. LITWACK is Alexander F. and May T. Morrison Professor of American History at the University of California at Berkeley. He is a past recipient of the Pulitzer Prize in History, the American Book Award in History, and the Society of American Historians' Francis Parkman Prize. He is a former president of the Organization of American Historians, a member of the American Academy of Arts and Sciences, and a member of the executive committee of the American Council of Learned Societies. Professor Litwack's books include *Been in the Storm So Long: The Aftermath of Slavery*; *Trouble in Mind: Black Southerners in the Age of Jim Crow*; *North of Slavery: The Negro in the Free States, 1790-1860*; and *Without Sanctuary: Lynching Photography in America*. His writings have appeared in the Journal of American History, New England Quarterly, and Journal of Negro History. He has received grants and fellowships from the Rockefeller Foundation, the National Endowment for the Humanities, and the John Simon Guggenheim Foundation. Professor Litwack has taught at the University of California at Berkeley, the University of Wisconsin, the University of Mississippi, the University of South Carolina, and several universities abroad. He received his M.A. and Ph.D. from the University of California at Berkeley.

BLANCHE WIESEN COOK is Distinguished Professor of History at John Jay College of Criminal Justice, City University of New York. She is the author of many ground-breaking works, including *Eleanor Roosevelt*, a two-volume biography; *The Declassified Eisenhower: A Divided Legacy of Peace and Political Warfare* (listed by The New York Times Book Review as one of the notable books of 1981); *Crystal Eastman: On Women and Revolution*; and *Century of Change*. She has also served on the editorial board of The Garland Library of War and Peace, a 360-volume reprint series. Professor Cook earned her M.A. and Ph.D. from Johns Hopkins University. Her fields of scholarship include women's history and U.S. international relations.

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Professor Trachtenberg was the recipient of the International Center of Photography's Writing Award for 1991. He has held fellowships from the American Council of Learned Societies, the National Endowment for the Humanities, the Rockefeller Foundation, and the Guggenheim Foundation. He taught at the Pennsylvania State University from 1961 to 1968, and has been a member of the Yale faculty since 1969, where he has served as Chairman and Director of Graduate Studies in American Studies. His visiting positions include Fulbright professorships at Leningrad State University and at the Kyoto American Studies Seminar in Japan; the Caroline Werner Gannett Visiting Professorship in the Humanities, Rochester Institute of Technology; and a visiting professorship in the Science, Technology, and Society Program, Massachusetts Institute of Technology. He has been a fellow of the Center for Advanced Study in the Behavioral Science, Palo Alto, California, and the Woodrow Wilson Center, Washington, D.C. In 1992-1993 Professor Trachtenberg was a Phi Beta Kappa Visiting Scholar, and in 1996 he held a short-term fellowship at the Indiana University Institute for Advanced Study. In 1998-1999, he held the Times Mirror Foundation Distinguished Fellowship in American Studies at the Huntington Library. He received his Ph.D. in American Studies from the University of Minnesota.

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The *amici* represented herein are professional historians who do original research with primary sources to write peer-reviewed articles and monographs on topics of history. As professional historians, they are concerned that the Brief *Amici Curiae* submitted by Ken Burns, *et al.* in support of petitioners does not accurately portray how historians practice their craft or how they use newspapers and periodicals. The

historians herein believe that the Court will benefit from a description of how historians conduct their research, how they use a variety of sources as evidence, and how they see the use of commercial electronic databases for historical research.

SUMMARY OF ARGUMENT

Contrary to the impression given by the Burns *amici*, professional historians do not view newspapers and magazines as the most important source for their work, nor have the commercial databases of newspapers and magazines played a central role in their research. Historians are generally apt to rely more on other primary sources such as diaries, letters, memoirs, interviews, government records, maps, artwork, and literature. Indeed, a review of recent books by Burns *amici* Doris Kearns Goodwin and David McCullough show that their own historical writing relies on the whole range of available source materials. No serious historian would present a work based primarily on contemporaneous news accounts.

Moreover, since their coverage only extends back some twenty years at best, the commercial databases have so far been of marginal value to historians. Such databases were in fact designed to provide easy access to stories and documents needed by active players in the nation's economic and public life, and are not maintained with the needs of scholars in mind. Historians are more likely to need to see the newspapers in their original form, as experienced by the contemporaneous readers, to appreciate the significance and meaning of the information contained in them.

Virtually all of the available literature contradicts the Burns *amici's* view that computer databases are the only means to preserve the historical memory contained in newspapers and periodicals. The rapid changes in hardware and software, coupled with the fragility of the storage medium, make

computer databases obsolete and unreadable within a few short years. As one researcher in the field puts it, "The vision of creating digital libraries that will be able to preserve our heritage currently rests on technological quicksand."[2] The result is that the original newspapers and magazines will be available to scholars long after most of the present databases become indecipherable.

Affirmance of the Second Circuit judgment will not result in a "black hole" in the historical record. Based on petitioners' figures, the case involves approximately 0.0036% of the 2.8 billion documents available on the Nexis service. There is no basis for assuming that the relief to be granted in this case, or in a class action following the Second Circuit ruling, would require deletion of the freelance authors' contributions. It is just as likely that additional compensation to the freelance writers for the past infringements will be ordered based on a formula or set of criteria that can be efficiently administered. Even if the contributions of free-lance writers disappeared from the commercial databases, the articles in question would still be indexed and available as necessary in hard copy to historians. They are "lost to history" only if one assumes that a historian is limited by what is available on the computer screen.

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[2] Jeff Rothenberg, *Avoiding Technological Quicksand: Finding a Viable Technical Foundation for Digital Preservation, A Report to the Council on Library and Information Resources*, at 1 (Jan. 1999), also available at <http://www.clir.org/pubs/reports/rothenberg/pub77.pdf> (visited Feb. 13, 2001).

There are, to be sure, serious problems with the nation's archives, and the Burns *amici* are certainly right to be concerned with the preservation of historical records. However, the answer to preserving archives is to allocate the money and resources necessary to the task, not to sacrifice the legal rights of freelance writers to this supposed greater good. Should the defendants in this case prevail, it could cause grave damage to the role of independent writers in society. The inability to earn any more than their one-time fee for their original work, no matter how popular the article might become in the digital archives, may cause freelance writers to stop writing. The irony of the position taken by the Burns *amici* is that they regard the potential loss of past materials by freelance writers as causing "inestimable" damage to historians—yet they support an outcome that will help extinguish those same voices in the future. For these reasons, the arguments of the Burns *amici* do not provide any basis for reversing the Second Circuit's judgment.

ARGUMENT

The Burns *amici* express concern that the Second Circuit's decision "will have unexpected, unprecedented, and irreversible consequences for the integrity and accessibility of the historical record and the progress of historical scholarship." Burns br. at 4. According to them, newspaper and periodical databases have become "an irreplaceable and priceless resource" because of the way in which they simplify the tasks of researchers. *Id.* at 5. Because the databases supposedly possess such obvious advantages over the paper-printed newspapers and periodicals, libraries and other archival institutions have focused on maintaining electronic compilations of these publications, to the exclusion of the original publications. *Id.* at 5-6. If defendants are required to actually pay plaintiffs for this new electronic publication of their work, the Burns *amici* believe that the original

publishers will simply delete the contributions of freelance writers from the databases rather than attempt to obtain consent after the fact and pay fair compensation. The original articles will therefore be lost to history.

As shown below, most of these assumptions are wrong. Commercial databases of newspapers and periodical stories have not been critical to historians, although such databases may be very useful to business leaders, political commentators, and lawyers. Even when relevant, such databases do not eliminate the need for historians to seek other, generally more important primary sources. Further, the assertion that a victory for the plaintiffs will automatically result in the removal of the stories from the databases seems both extreme and unlikely. Finally, even if they will be harder to read, the articles are not going to disappear from history, because commercial databases are unlikely to be the primary record of today's newspapers and periodicals.

I. THE HISTORIANS' CRAFT DOES NOT DEPEND ON ACCESS TO COMMERCIAL ELECTRONIC DATABASES.

The brief of the Burns *amici* rests primarily on the fundamental misconception that the historical record is largely contained only in commercial computer databases, and that historians rely substantially on such commercial databases. As discussed below, newspaper and magazine articles are not usually the primary emphasis in historical research, which is concerned with a much larger universe of primary sources[3] that provide direct evidence about the past.

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[3] "A primary source gives the words of the witnesses or the first recorders of an event. Primary sources include manuscripts, archives, letters, diaries, and speeches . . . . Secondary sources are descriptions of the event derived from and based on primary sources. The line between primary and secondary sources is often indistinct, for example, a single document may be a primary source on some matters and a secondary

While the ability to quickly search commercial databases is a time-saver and can be a powerful research tool, the usefulness of such databases is limited by the relatively tiny number of historically significant documents which appear in commercial databases, and by the fact that newspaper articles are generally not the most critical source.

A. Newspaper and Magazine Articles Are Only One Among Many Sources For Historical Research.

Professional historians conduct a disciplined investigation of the facts of the past with a view toward interpreting (or re-interpreting) past human events. Writing history is really "an unending dialogue between the present and the past." E.H. Carr, *What is History* at 35 (1962).[4] The credibility of any such historical interpretation, however, depends on setting forth reliable and verifiable facts about the events in question. Just as a litigator's closing argument to the jury must rely on evidence admitted at trial according to the rules of evidence, so the professional historian must rely on the kind of evidence generally considered reliable and probative within the profession.

The brief of the Burns *amici* gives the wholly erroneous impression that central to the historian's work are the facts which can be gleaned from newspaper and magazine articles. Nothing could be further from the truth. "The variety of historical evidence is nearly infinite. Everything that man says or writes, everything that he makes, everything he touches can and ought to teach us about him." Marc Bloch, *The Historian's Craft* at 66 (1953). While contemporary

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source on others." Helen J. Poulton, *The Historian's Handbook* at 175-76 (1972).

[4] Professor Carr was for many years a Fellow at Trinity College, Cambridge.

journalistic accounts can provide a starting point for historians in examining a certain era or certain types of events and can provide vivid details to be incorporated into the final narrative, no professional historian would give automatic priority to such evidence. The critical factual data of the past is to be found in many other primary sources: diaries, private correspondence, memoirs, interviews, transcripts of government proceedings, government archives, private or corporate archives, accounting records, tax receipts, economic statistical tables, maps, photographs, movies, literature, works of art, audio tapes, medical reports, even site visits to the place of critical events—the list is inexhaustible.[5] Any professional historian who presented a monograph principally relying upon facts derived from contemporary newspapers would be justly derided by his or her colleagues. Journalism has often been described as the first draft of history—but no historian would confuse a first draft with the final product.

Although the brief of the Burns *amici* stresses the primacy of newspaper stories in writing history, the books by the same historians do not support that assertion. The historical works by Doris Kearns Goodwin, David McCullough, and others follow the dictates of the profession by relying on a careful review of all of the primary sources, with an emphasis on the disciplined review of unpublished sources found in archives.[6]

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[5] According to Pulitzer Prize-winning historian Barbara Tuchman, "The most primary source of all is unpublished material: private letters and diaries or the reports, orders, and messages in government archives. There is an immediacy and intimacy about them that reveals character and makes circumstances come alive." Barbara W. Tuchman, *Practicing History* at 19 (1981).

[6] *See, e.g.*, Blanche Wiesen Cook, 2 *Eleanor Roosevelt: 1933-1938* at xiv (1999) ("Biographers and historians depend on archives and libraries. . . ."). For a more detailed description of the historian's use of archives and the extensive research required to write history, *see* Tuchman, *supra* at 18-37, 76-79. Even in the archives, the historian cannot assume that the

For example, in her Pulitzer Prize-winning history of Franklin and Eleanor Roosevelt, *No Ordinary Time* (1994), Ms. Goodwin wrote that the 700-page book "relies predominantly upon a multitude of primary materials: manuscript collections, memoranda, private letters, diaries, memoirs, office files, world histories, pamphlets, newspapers, periodicals, personal interviews." *Id.*, "A Note on Sources," at 637. These primary materials included the White House Usher Diaries, which provided "day-by-day, even minute-by-minute chronologies [that revealed] when President and the First Lady awakened, who joined them for meals and meetings, how much time spent with each visitor, where they went during the day, when they went to bed at night." *Id.* at 637. She added, "I treasure the details that emerged from these primary sources. . . ." *Id.* Ms. Goodwin also conducted 86 interviews. *Id.* at 638-39. While she added that "some of my favorite details came from the press reports of the time," it is clear from her description that she is referring to factual details from news stories, not the occasional opinion piece that might have been penned by a freelance writer. *See id.* at 638.

David McCullough's Pulitzer Prize-winning biography, *Truman* (1992), similarly relies on a wealth of primary research, not simply the reading of computerized news articles. This 1000-page biography of the former President contains 58 pages of footnotes and 24 pages of bibliography. Mr. McCullough's research included 125 interviews conducted by the author and another 66 transcripts from oral history projects. He made extensive use of the manuscript

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necessary materials will be neatly catalogued anywhere. In researching her biography of J.P. Morgan, Jean Strouse found "vaults of uncatalogued biographical documents, including Morgan's childhood diaries and schoolbooks, his adult letters and cables, volumes of business correspondence, hundreds of photographs, and extensive files on his purchases of art." Jean Strouse, *Morgan: American Financier* at x (1999).

collection at the Truman library, the unpublished papers from a number of other archives, published government documents, memoirs, and relevant histories of the era. Indeed, in his acknowledgments, Mr. McCullough noted that he personally retraced the steps of President Truman's run through the Capitol building on the "fateful evening" of April 12, 1945. *Id.* at 994. The author supplemented these sources with citations from a number of newspapers, magazines and journals of the period.

The examples cited above further demonstrate how commercial databases of newspaper articles are peripheral to the work of historians. These works are essentially modern histories. Nevertheless, virtually none of the events described in the books would be covered by news articles contained in the databases of defendant Lexis-Nexis, because the commercial databases do not cover any period except the last 20 years, at best.[7] Any historian writing about events prior to around 1977 would find the commercial databases of newspaper articles useless.

The limited usefulness of commercial databases to historians is not surprising, since such databases were designed to provide a different service to a different audience. Databases like Nexis are designed to provide quick and easy access to documents which will have relevance to active players in the nation's economic life, public affairs, and legal profession. They are heavily weighted toward corporate and financial news, court cases, governmental rules and decisions, and world affairs which impact the global economy. Such

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[7] According to their website, the Nexis database contains full text of articles from The New York Times only back to January 1,1980; the Washington Post back to January 1, 1977; Newsday back to January 2, 1988; Time Magazine back to January 5, 1981; the Chicago Tribune back to January 1, 1985; and the Arizona Republic back to January 1, 1993. *See* <http://www.lexis-nexis.com/lncc/scripts/*> (visited February 9, 2001).

databases allow busy corporate executives, political commentators, and news analysts to quickly obtain a superficial familiarity with virtually any topic of current relevance. However, historians, when they are acting in their professional roles, generally need documents that are of peripheral or no concern to contemporary managers, and that are unlikely to have been included in commercial databases. The Burns *amici* refer to themselves as "historians, political commentators and authors," Burns br. at 3, without any apparent recognition that their research needs and the sources they use may be very different depending upon what role they are filling.[8]

To be sure, the ability to search text using key words is a welcome tool for researchers (although hardly a panacea for the difficulties of careful research). Moreover, there are promising developments in making certain historical archives—or at least portions thereof—available to historians in digital format, primarily over the Internet.[9] Such increased access to certain primary sources will assist historians and students of history,[10] but it is highly unlikely that such digital

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[8] In a recent interview, Charles Maday, Jr., senior vice president of programming for The History Channel, noted, "I don't think Ken Burns is really a historian. He's a filmmaker who's interested in history." Ronald J. Grele, *An Interview with Charles Maday Jr. of The History Channel*, Newsletter of the Organization of American Historians (Nov. 2000), also available at <http://www.oah.org/pubs/nl/2000nov/maday.html> (visited Feb. 9, 2001). It is surely no criticism of Mr. Burns that his extraordinary films are the product of a very different process, with a different audience in mind, from that of professional historians creating a monograph.

[9] *See, e.g.*, The American Memory Homepage, presented by the Library of Congress's National Digital Library Program, available at <http://lcweb2.loc.gov/ammem/ammemhome.html> (visited Feb.12, 2001).

[10] *See* Abby Smith, *Why Digitize?* at 8 (Feb. 1999) (Council on Library and Information Resources ("CLIR")), available at <http://www/clir.org/pubs/reports/pub80-smith/pub80.pdf> (visited Feb. 13, 2001).

archives will include the entire universe of archived documents, that they will replace the original documents in question, or that historians will no longer need to visit the relevant archives in person to inspect their collections. Using electronic databases to increase access to primary sources is not the same as replacing those primary sources with electronic versions. Moreover, such free access to electronic archives established by public and private nonprofit entities does not affect the issues raised by this case or the points raised by the Burns *amici*, which are focused on the legal rights of authors in copyrighted articles appearing in commercial databases.

Thus, the Burns *amici* have overstated the advantages of having newspaper and magazine articles in electronic databases. Because they are created for purposes other than historical research, the databases are likely to cover, at best, only part of the published material to be investigated. The work of the Burns *amici* demonstrates what the *amici* herein have found in their own work, that there is no short-cut to historical inquiry. Newspaper and magazine articles are only one part of a much larger puzzle.

B. The Methodology of Historians Is Not Based on Using Individual Newspaper and Magazine Articles as Essential Building Blocks.

A related misconception in the Burns *amici* brief concerns how historians work. They cite comments from historian Douglas Brinkley during a panel discussion to the effect that the historian or biographer obtains a first draft of the work by pulling all the individual newspaper articles about the subject and filing them chronologically. Supposedly, the author then "fill[s] that in" with interviews, documentary evidence, and some other "obvious books or articles." Burns br. at 17. One suspects that the brief has oversimplified Mr. Brinkley's views, and that Mr. Brinkley himself does not actually work

in this way. It is certain that most professional historians engage in a much different, and more complicated approach to their writing.

Describing the work of the historian, E.H. Carr wrote:

> Laymen—that is to say, non-academic friends or friends from other academic disciplines—sometimes ask me how the historian goes to work when he writes history. The commonest assumption appears to be that the historian divides his work into two sharply distinguishable phases or periods. First, he spends a long preliminary period reading his sources and filling his notebooks with facts; then, when this is over, he puts away his sources, takes out his notebooks, and writes his book from beginning to end. This is to me an unconvincing and unplausible picture.

Carr at 32-33. Professor Carr continued:

> I am convinced that, for any historian worth the name, the two processes of what economists call "input" and "output" go on simultaneously and are, in practice, parts of a single process. If you try to separate them, or give one priority over the other, you fall into one of two heresies. Either you write scissors-and-paste history without meaning or significance; or you write propaganda or historical fiction, and merely use facts of the past to embroider a kind of writing which has nothing to do with history.

Id. at 33. Marc Bloch asserted a similar point:

> Many people and, it appears, even some authors of manuals entertain an extraordinarily simplified notion of our working procedure. First, as they are only too eager to tell you, there are the documents. The historian collects them, reads them, attempts to weigh their authenticity and truthfulness. Then, and only then, he makes use of them. There is only one trouble with this idea: no historian has ever worked in such a way, even when, by some caprice, he fancied that he was doing so.

> For even those texts or archeological documents which seem the clearest and the most accommodating will speak only when they are properly questioned. . . . Mere passive observation, even supposing such a thing were possible, has never contributed anything productive to any science.

Bloch at 64-65.[11]

The Burns *amici* make the further erroneous assumption that "the focal point of research has always been, and will always be, the retrieval of individual articles. . . ." Burns br. at 16. According to them, it is unnecessary to ever see the original publication. While access to the pure text alone is sometimes enough, professional historians are frequently concerned not just with the information in the article, but with the significance of the article's publication and how the article was experienced by the readers at the time. Judgments about the meaning of the article often depend on seeing the original article, noting where the article appears in the publication, what kind of headline it carried, whether it was accompanied by an illustration and what it was, and whether there were companion articles.[12] As one researcher of library

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[11] A highly regarded French historian, Bloch fought in the French army in World War II until its defeat in May 1940. After his release to Vichy France, he wrote the text for this book and then joined the French resistance in 1942. He was captured by the Nazis in Spring 1944, imprisoned, tortured, and finally executed on June 16, 1944. The book was readied for publication by historian Lucien Febvre after the war. *Id.* at viii-ix.

[12] For example, assume it was possible to find on a computer database the lead story about the results of the presidential election which ran in the Chicago Tribune on November 3, 1948. Any historian who simply attempted to report the content of the story, without having seen the article with its banner headline "DEWEY DEFEATS TRUMAN," would have missed a great deal of the publication's import. Fortunately, it was captured in the memorable photograph of a grinning (and victorious) President Truman holding the newspaper aloft several hours later—a

science reported, "What has emerged clearly . . . is the unchanging desire for scholars to work with original, unformatted, primary source materials, from paper manuscripts to vintage photographs . . . ."[13] Indeed, depending upon the focus of the investigation, the historian may be more interested in the newspaper or magazine as an organic whole and must be able to read the publication in its entirety and in its original format.[14] Such context becomes even more important where historians move from the more traditional political histories and attempt to write a social history of a period or place. None of this analysis is possible in the commercial databases, which contain only the most rudimentary notations of page number and exclude all pictures, photographs, maps, tables, cartoons, death notices, and advertisements. *Tasini v. The New York Times Co., Inc.*, 206 F.3d 161, 164 (2d Cir. 2000). To a social historian, the advertisements alone in a newspaper provide a wealth of information about how a group of people lived their lives.[15]

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photograph that would not be available on Nexis, which does not contain any nontextual material. *See* McCullough, *Truman*, at 718.

[13] Abby Smith, *The Future of the Past: Preservation in American Research Libraries*, at 13 (April 1999) (published by CLIR), also available at <http://www.clir.org/pubs/reports/pub82/pub82.pdf> (visited Feb. 13, 2001).

[14] "The size of newspapers is indispensable to our experience of their content. The newspaper reader proceeds nonlinearly, not as he would holding a typical book but circling around the open double-page spread . . . moving his whole head as well as his eyes. . . . Even papers that have no pictures at all have a visual exorbitance, a horizon-usurping presence that a microfilm's image . . . subverts and trivializes." Nicholson Baker, *Deadline*, New Yorker at 49 (July 24, 2000).

[15] Advertisements can be critical to the political historian as well. As one example, historians writing about the U.S. presidential campaign of 1968 would miss a great deal if they were ignorant of the numerous full-page advertisements appearing in The New York Times during 1967-68, signed by thousands of educators and other professionals, opposing President Johnson's policy in Vietnam.

Finally, even if an individual historian was inclined to work in the manner suggested by Mr. Brinkley, the Second Circuit decision would have no effect on him or her. The "building blocks" for the chronology, news stories and editorials, would still be readily available in the commercial databases. Thus, there is nothing about the work process or methodology of historians which would support the defendants' position in this case.

C. The Burns *Amici* Overstate the Importance of Commercial Databases to the Preservation of the Historical Record.

An essential misconception underlying the argument of the Burns *amici* is that books, newspapers and magazines as originally published are ephemeral objects which will quickly become unavailable to historians. Although the commercial databases are too recent to have impacted much historical work to date, the Burns *amici* are apparently concerned about the integrity of those databases for future historians studying our time. According to the Burns *amici*, documents of the past will live eternally only if they become digital. Burns br. at 9-11. However, many scholars and archivists are finding that the opposite is true: that the transformation of our records of the past into a new medium will more likely lead to the loss of these records.[16] "The vision of creating digital

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[16] See Jeff Rothenberg, *Avoiding Technological Quicksand: Finding a Viable Technical Foundation for Digital Preservation, A Report to the Council on Library and Information Resources*, at 1-2, 4-5, 7-16 (Jan. 1999) (hereinafter *Quicksand*) (published by CLIR), also available at <http://www.clir.org/pubs/reports/rothenberg/pub77.pdf> (visited Feb. 13, 2001); Jeff Rothenberg, *Ensuring the Longevity of Digital Information* (Feb. 22, 1999) (RAND Corp.), also available at <http://www.clir.org/pubs/archives/ensuring.pdf> (visited Feb. 13, 2001); Donald Waters & John Garrett, *Preserving Digital Information: Report on Archiving of Digital Information, commissioned by the Commission on Preservation and Access and the Research Libraries Group* (May 1,

libraries that will be able to preserve our heritage currently rests on technological quicksand." Rothenberg, *Quicksand* at 1. It now appears that computer databases may have an even shorter lifespan than newsprint. As one task force in the field concluded:

> Rapid changes in the means of recording information, in the formats for storage, and in the technologies for use threaten to render the life of information in the digital age as, to borrow a phrase from Hobbes, "nasty, brutish and short." [17]

The constant transformation of technology often means that the hardware and software necessary to read the previously encoded electronic database shortly becomes unavailable.[18] A special committee examining the future of the Library of Congress has noted:

> Digital materials are especially vulnerable to loss and destruction because they are stored on fragile magnetic and optical media that deteriorate rapidly and that can fail suddenly from exposure to heat, humidity, airborne contaminants, faulty reading and writing devices, human error, and even sabotage.
>
> Digital materials become unreadable and inaccessible if the playback devices necessary to retrieve information from the media become obsolete or if the software that translates digital information from machine- to human-readable form is no longer available.

1996), available at <http://www.rlg.org/pub/archtf/final-report.pdf> (visited Feb. 13, 2001); Smith, *Why Digitize*, at 4-5.

[17] *Preserving Digital Information*, *supra* at 2.

[18] Rothenberg, *Quicksand*, at 7-9. This phenomena will be familiar to lawyers who just ten years ago may have carefully put their forms and brief bank on 5 1/4" floppy disks with a software like WordPerfect 4.1. No modern computer can read those disks anymore. Unless the data was fed into a network, upgraded and transferred by the system administration to a new network server (and translated into a more modern software version), it is lost.

Committee on an Information Technology Strategy for the Library of Congress, *LC21: A Digital Strategy for the Library of Congress* at 4-2 (2000) (citation omitted). A journalist examining the problems at the National Archives concluded, "The problem of technological obsolescence—of fading words and images locked in odd-looking, out-of-date equipment—is an even bigger problem for the computer age than it was for the media produced in the first half of the century." Alexander Stille, *Overload*, New Yorker at 38 (March 8, 1999).[19] A prominent library specialist described the problem this way: "We all know that we don't *decrease* the preservation problem by relying on digital information, we only *increase* it. As [one preservationist] put it, 'being digital means being ephemeral.'" (emphasis in original).[20]

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[19] Mr. Stille cited a number of examples of the problems faced by the National Archives:

> In the nineteen-eighties, the Archives transferred some two hundred thousand documents and images onto optical disks—the cutting edge of new technology at the time. "I'm not sure we can still play them," [a preservation specialist] says, because they depend on computer software and hardware that are no longer on the market.

Id. at 42. In addition, many of the government's records from the Vietnam War era were stored on a data system that IBM no longer supports. *Id.* at 43.

[20] Anne Kenney, *Keynote Address: Guidelines vs. Guidance for Digital Imaging: The Opportunity Before Us.* Available at <http://www.thames.rlg.org/preserv/joint/kenney.html> (visited Feb. 7, 2001). The author is Associate Director of the Department of Preservation and Conservation, Cornell University, and was speaking to a joint conference of the Research Libraries Group and the National Preservation Office. She further warned, "It is important to keep in mind that technology is not our friend. If things appear to be difficult it's probably because they are difficult." *Id.*

Some have even expressed concern about how millions of old newspaper editions have been irretrievably lost because librarians and archivists, strapped for space, microfilmed and then destroyed the

The Burns *amici* further ignore the problem of errors and data corruption which occur whenever data is converted from one medium to another. *See* Rothenberg, *Quicksand*, at 13-14; Richard H. Eckman, *Can Libraries of Digital Materials Last Forever?*, Change at 24 (March/April 2000). This is true of newspapers as well. A four-month study at the University of North Carolina by the editor of the Internet version of the Arkansas Democrat-Gazette found numerous discrepancies between the contents of the newspapers as published on paper and the editions made available on commercial databases. In one case, a defamatory reference to a public figure was pulled just before press time from the printed paper, but made its way online in the Lexis-Nexis database. Bruce William Oakley, *How Accurate Are Your Archives?*, Columbia Journalism Review at 13 (March/April 1998).[21]

Even if it were desirable, the creation of electronic versions of newspapers and magazines does not solve the problem of historical memory, but creates new problems. There is no

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originals. *See, e.g.*, Mark Singer, *Missed Opportunities Dept.: Did the New York Public Library Let Some History Slip Through Its Fingers?*, New Yorker at 29 (Jan. 12, 1998); Nicholson Baker, *Deadline*, New Yorker at 42 (July 24, 2000). Even library professionals who support microfilming are wary of digitization of documents as a preservation strategy. Smith, *Why Digitize?* at 3-4; Hartmut Weler, Marianne Dorr, *Digitization as a Means of Preservation?* at § 1 (Oct. 1997), available at <http://www.clir.org/pubs/reports/digpres/digpres.html> (vistited Feb. 13, 2001) (final report of a working group of the German Research Association, translated and distributed by the European Commission on Preservation and Access).

[21] Mr. Oakley further reported:

> One librarian, at the Nashville Tennessean, sighed and said that microfilm or microfiche of the real, printed newspaper is the archive of record; the digital version is secondary. But rare is the reporter - or law firm, student, or ordinary citizen—who will turn to microfilm if a digital record exists.

Id.

guarantee that electronic databases, commercial or otherwise, will adequately preserve newspapers and periodicals. To the contrary, future historians may well be relying on paper copies of today's newspapers long after the databases and CD-ROMs have become indecipherable.

D. Affirmance of the Second Circuit Will Have Little, If Any, Effect on the Preservation of the Historical Record.

The Burns *amici* overstate the effect that an affirmance of the Second Circuit opinion would have on the historical record. First, the number of articles involved is relatively small. Out of the 2.8 billion records available on Nexis,[22] defendants have identified only approximately 100,000 articles which may be affected by the decision. Pet. for cert. at 13. This amounts to about 0.0036% of the records in the database—hardly a major factor in the preservation of our historical memory.

The Burns *amici* further assume that, absent a reversal of the Second Circuit opinion, the only result of the case can be individual negotiations between the original publisher and each of the freelance authors. This confuses liability with remedy. The Second Circuit has so far simply recognized the applicability of the freelance writers' copyright to such electronic republishing. It does not address the remedy to which the six plaintiffs may be entitled, let alone how a court might fashion an appropriate remedy for past violations of the copyrights of a class of freelance writers. Federal courts are familiar with applying formulas to the computation of damages which may not be exact but which do substantive justice to the injured parties without the need to conduct individual consideration or negotiation with every class

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[22] *See* <http://www.lexis-nexis.com/business/whatsnew.htm> (visited Feb. 9, 2001).

member.[23] The *amici* here do not propose to suggest the proper remedy in this case, only to note that the deletion of previously published articles from commercial databases is not by any means the only, or even likely, outcome of this case.

Further, treating freelance writers fairly will not result in a black hole of historical materials. Even with the ongoing digitization of archives, the articles written by freelance writers will be referenced in indexes of periodicals, and will still appear in the bound volumes or the microfilm replications of the publications that are housed in thousands of libraries around the world. They are "lost to history" only if one assumes that a historian is limited by what is available on the computer screen. Even a cursory review of the acknowledgments, footnotes and bibliography of any serious historical work will demonstrate that historians do not consider themselves limited by what is easily available.

II. THE COPYRIGHTS OF FREELANCE WRITERS SHOULD NOT BE IGNORED SIMPLY TO SOLVE THE UNRELATED PROBLEM OF NEGLECT OF THE NATION'S ARCHIVES.

There are, to be sure, serious problems with the nation's archives, and the Burns *amici* are certainly right to be concerned with the preservation of historical records. However, the answer to preserving archives is to allocate the

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[23] These principles are followed in other areas of commercial litigation. "[I]t is hornbook law that 'doubts as to the certainty of damages will be resolved against the wrongdoer, as the wrongdoer must bear the uncertainty which its conduct has created." *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 93 (S.D.N.Y 1998) (quoting 22 Am. Jur.2d Damages § 491 (1988)). *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("It will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference"). *See generally* 2 Herbert Newberg & Alba Conte, Newberg on Class Actions § 10.03 (3d ed. 1992).

money and resources necessary to the task, not to sacrifice the legal rights of freelance writers to this supposed greater good. If the preservation of these records for posterity was such an important public task, one might expect the defendants here to assume a large share of the cost themselves. As the record demonstrates, that is not the case: the publishers of the periodicals are paid by Lexis-Nexis to provide the articles, Lexis-Nexis is paid by its subscribers for access to the articles, and a payment based on that access is remitted to the original publisher. *See* Brief of Amici Advance Publications, Inc., *et al.*, at 17-18. All of the defendants profit from making these records available in electronic form; only the freelance copyright holders are asked to assume responsibility for historical memory.

Nor do the Burns *amici* address the obvious problem of protecting their own works. If publishers can simply sell their periodical articles to another entity to distribute in electronic format, without further payment to the author holding the copyright, why can't they do the same with books? The idea of the public having immediate and searchable access to an electronic version of *Truman* or *No Ordinary Time* may be tantalizing for students and other readers of history, yet one suspects that the Burns *amici* would rightly be wary of such a plan if it did not provide for royalty payments to them. They would rightly see such action as a clear violation of their copyrights and a substantial disincentive to investing the considerable time and effort to producing future works.

Finally, there is a grave concern that should the defendants in this case prevail, it could damage the role of independent writers in society. The freelance writers who are affected by this case are, by and large, an impecunious group that receives little compensation for their writing as it is. *See* J.A. 389a, 407a, 418a-419a, 430a, 464a. The inability to earn any more than their modest one-time fee for their original work,

no matter how popular the article might become in the digital archives, may cause them to stop writing. The irony of the position taken by the Burns *amici* is that they regard the potential loss of past materials by freelance writers as causing "inestimable" damage to historians—yet they support an outcome that will help extinguish those same voices in the future. Attempting to make freelance writers pay for the sins of others in neglecting the nation's archives does not appear to have been part of Congress' intent in passing the Copyright Act and its amendments. As historians, the *amici* herein do not believe such an outcome serves the interests of the historical record either.

CONCLUSION

For all the above-stated reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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